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Native Americans Versus Archaeologists: The Legal Issues

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NATIVE AMERICANS VERSUS ARCHAEOLOGISTS: THE LEGAL ISSUES

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> "Let me be a free man, free to travel, free to stop, free to choose my own teachers, free to follow the religion of my fathers, free to talk, think and act for myself—and I will obey every law or submit to the penalty." Chief Joseph of the Nez Perce, 1878.[1]

Introduction: Archaeology as Desecration

The peoples of the Old World and the New World were separated by the forbidding vastnesses of oceans and the even greater distances of millenia. It is not surprising that when representatives of cultures of the Old and the New worlds met, their conflicts were profound. Nor is it surprising that conflicts continued until the New World was explored and settled by the peoples of the Old World. If not surprising, it is at least unsettling that Native Americans and other Americans still are engaged in conflicts.

The subject of this article is the conflict that emerged over the last decade between archaeologists and Native Americans concerning the excavation of historic and prehistoric skeletal remains of Native Americans and artifactual materials of religious significance.[2] Archaeologists have traditionally viewed their activities as consonant with the highest duties of science to study and understand the world.[3] Native Americans, after a long eclipse, are asserting their ancestral identities and are in various degrees disturbed by the activities of archaeologists. Despite the fact that

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1. Chief Joseph, *An Indian's Views of Indian Affairs*, 128 N. AM. REV. 412, 433 (1879).

2. See EARLY MAN MAGAZINE (Autumn 1981) for a discussion of the ethical and scientific dimensions of the controversy. V. Deloria's polemical *Custer Died For Your Sins* (1969) presents another point of view. *See also* Johnson, *Professional Responsibilities and the American Indian*, 38 AM. ANTIQUITY 129 (1973).

3. *See* K. CHANG, RETHINKING ARCHAEOLOGY (1967); G. WILLEY & P. PHILLIPS, METHOD AND THEORY IN AMERICAN ARCHAEOLOGY (1958); W. TAYLOR, A STUDY OF ARCHAEOLOGY (1948); V. CHILDE, PIECING TOGETHER THE PAST (1956); THE DEVELOPMENT OF NORTH AMERICAN ARCHAEOLOGY (J. Fitting ed. 1973).

the controversy has been incorporated into larger political struggles for increased recognition of Native American rights, it is nonetheless apparent that many Native Americans are sincere in their desire that modern American society respect their religious beliefs and the remains of their ancestors. Thus the conflict is a continuing clash of disparate cultures.

Native Americans are by no means a homogeneous group. It has been estimated that at the time of Columbus' voyages, more than five hundred mutually unintelligible languages were spoken in North America.[4] Currently, some two hundred fifty tribes are recognized by the federal government.[5] With members scattered in all fifty states, the tribes have differing perspectives and desires.[6] It is therefore difficult to articulate a world view representative of all Native Americans.[7] Presumably, a generally accepted position would be that human remains and religious artifacts of Native Americans should be given the same respect accorded to the human remains and religious artifacts of other Americans, and that the disturbance of the dead or of religious objects alters, destroys, or desecrates some relationship with the spirit world. Therefore, the dead should not be disturbed even if knowledge of the past could be gained thereby.

The world view of archaeologists is much more uniform than that of Native Americans. The majority have advanced degrees in anthropology and are of European descent. Their frame of reference is that of science generally. Their research is to obtain knowledge of man and his world for the greater benefit of all peoples. Archaeologists presumably would maintain that the systematic study of excavated materials is virtually the only way to obtain direct knowledge of past peoples and that this is a desirable goal for American society.[8]

4. H. DRIVER, INDIANS OF NORTH AMERICA (1980).

5. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1980 (101st ed. 1980).

6. *Id.*

7. E. HOEBEL, ANTHROPOLOGY 491 (1966) defines "world-view" as "The view of life and the total environment that an individual holds or that is characteristic of the members of a society. . . . It is the human being's inside view, colored, shaped, and rearranged according to his cultural preconceptions."

8. Archaeologists in many states have responded to the controversy by a heightened sensitivity usually expressed in the adoption of guidelines or policy statements, e.g., the American Committee for Preservation of Archaeological Collections (California), the Council for the Conservation of Indiana Archaeology, Inc. (Indiana). The Indiana group has adopted generally the statement of the National Park Service as follows:

Where archaeological investigations encounter marked or identified deliberate in-

There is no little irony in the clash of these seemingly incompatible world views. Archaeologists, and anthropologists generally, have probably done more to preserve knowledge of Native American cultures and to dispel misconceptions about those cultures than any other element in American society. Also, archaeologists have invariably been motivated to enter the ranks of the profession because of a deeply held regard for Native American peoples and their past.

To face off the world views of scientific archaeologists with traditional Native Americans is to understand the difficulty of the issue. If either or both sides take uncompromising views, then conflict is inevitable. The probable consequence is a legal resolution of such matters. This article addresses the legal issues likely to arise in these cases.

The General Issue

What rights do American Indians have either to influence or to prevent archaeologists from scientifically investigating archaeological sites? As with most legal questions, the answers are largely tentative until courts and legislatures have spoken. Presently very few court decisions have focused on the issue. State and federal statutes addressing the question are more common and increasingly so.

American Indians occupy a special status in the American legal

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terments of human remains, Indiana law may be applicable. If this should not be the case, all prudent and feasible efforts will be made to identify and locate persons who can demonstrate direct kinship with or descent from the interred individuals. The [name responsible administrative head] in consultation with the most closely related family member will determine the proper disposition of the remains. No remains will be reinterred until the appropriate documentation and study have been made by a qualified physical anthropologist.

If no direct kin or descendants can be identified or located, but the disinterred human remains can be shown to have ethnic affinity to specific living groups, then all prudent and feasible efforts will be made to seek out traditional spiritual leaders, elders, or representatives for these groups. The [name responsible administrative head] in consultation with these leaders, will make a decision concerning the proper disposition of the remains. No human remains will be reinterred until after appropriate documentation and study are completed by a qualified physical anthropologist.

If the disinterred human remains cannot be identified with any specific contemporary group, the specific practices of any particular group are not applicable. Therefore, [name institution] will curate the remains with responsible and sensitive attitudes in keeping with the dignity and respect to be accorded to all exhumed human skeletal remains and in accordance with professional curation standards.

For defining "direct kinship," "ethnic," and "traditional representatives," *see* 25 C.F.R. § 54 (1980).

framework.[9] Originally recognized as sovereign nations, Indians continue to hold some measure of inherent sovereignty.[10] A special relationship exists between the federal government and Indians. Since the landmark decision of *Cherokee Nation v. Georgia*[11] Indians have been regarded, by the courts at least, as wards of a benign federal government. Consequently, Indian relationships with states and individual citizens have been subject to a continuing tension between state and federal authority.[12]

Generally, the sources of rights of Indians are to be found in the United States Constitution, in federal statutes, under treaties, by way of inherent tribal sovereignty, and in state statutes. How the rights found in these sources attach is largely determined by the location of archaeological sites, i.e., whether the location is on private property, state property, federal property, or tribal (reservation) property. These matters will now be separately considered.

I. *Rights Under the United States Constitution*

The First Amendment

The first amendment as it applies to religious matters has two elements.[13] The first is the establishment clause, which rigidly limits the role of government in religious affairs. The second is the free exercise clause. The general thrust of these clauses is to allow for diverse religious beliefs and activities within society, subject to some reasonable limitations that government may impose.[14] In *Cantwell v. Connecticut*,[15] Justice Roberts enunciated the fundamental principle:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the prac-

9. Oliver, *The Legal Status of American Indian Tribes*, 38 OR. L. REV. 193 (1959).

10. *See* Comment, *Inherent Indian Sovereignty*, 4 AM. INDIAN L. REV. 311 (1976).

11. 30 U.S. (5 Pet.) 1 (1831). Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7 (1975) analyzes Cherokee Nation v. Georgia and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

12. *See* generally Note, *The American Indian—Tribal Sovereignty and Civil Rights*, 51 IOWA L. REV. 654 (1966); Note, *The Constitutional Rights of the American Tribal Indian*, 51 VA. L. REV. 121 (1965).

13. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

14. Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

15. 310 U.S. 296 (1940).

> tice of any form of worship. . . . On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.[16]

The free exercise clause thus extends to individuals the right to believe virtually anything that can be construed as a religious matter, but acts based on that belief are subject to reasonable government regulation. The Court in *Cantwell* also enunciated the now familiar doctrine that the first amendment is applicable to the states through the fourteenth amendment.[17] In any legal contest between archaeologists and Native Americans, it is very likely that the free exercise issue will be raised.

The United States Supreme Court recently declined to hear the issue in *Sequoyah v. Tennessee Valley Authority*.[18] The issue arose in that case on a challenge by members of the Cherokee Tribe to the activities of the TVA in building the Tellico Dam and Reservoir. The plaintiff Indians argued that the destruction of religious and village sites by excavation and inundation impermissibly abridged their freedom of religion by denying them access to these sites. Plaintiffs also argued that the destruction of the sites disturbed important relationships between this world and the spiritual world. The district court in a memorandum opinion held that the free exercise clause does not give individuals the inherent right to enter property absent some property right in the individuals.[19] The court reasoned that in order to state a claim under the free exercise clause a plaintiff must show some coercion by government of actions based on religious beliefs.[20] The court found that the only coercive action by the TVA would be denial of access to the Little Tennessee River valley and that there is no precedent for limiting the property rights of anyone to allow the free exercise of religion to others. Therefore, plaintiffs failed to state a cognizable free exercise claim.[21]

The Sixth Circuit Court of Appeals on review affirmed the

16. *Id.* at 303-04.

17. *Id.* at 303.

18. 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

19. Sequoyah v. TVA, 480 F. Supp. 608 (E.D. Tenn. 1979).

20. *See* Wooley v. Maynard, 430 U.S. 705 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968).

21. *Sequoyah*, 480 F. Supp. at 611-12.

judgment of the district court but on somewhat different grounds. The court acknowledged that property interests were an important but not the only consideration.[22] The court determined that the Supreme Court decisions in *Sherbert v. Verner*[23] and *Wisconsin v. Yoder*[24] now require a two-step analysis for deciding a free exercise claim.[25] First, it is necessary to determine whether government action burdens the exercise of plaintiff's religion. Second, if a burden is found then it is necessary to balance the government's interest with the burden to plaintiff, the government being required to show a compelling reason for its action. The court never reached the second tier of the analysis because it found that under "the quality of the claims" test of *Yoder*,[26] plaintiffs had not established a sufficient burden to allege infringement of a constitutionally cognizable first amendment right.[27] The court said plaintiffs had not demonstrated that worship at that particular geographic location was either (1) "inseparable from their way of life,"[28] (2) "the cornerstone of their religious observance,"[29] or (3) "plays the central role in their religious ceremonies and practices."[30] The court found that because plaintiffs presented no claim of centrality or indispensability connected with their religious observances in the Little Tennessee River valley, they had not shown a cognizable burden to reach the threshold of a free exercise claim.[31] One judge dissented from the opinion and chided the majority for failing to remand the case so that plaintiffs could offer evidence concerning the centrality of the sites to the Cherokee religion.[32]

The opinion by the Sixth Circuit in *Sequoyah* apparently leaves open the possibility in future cases for plaintiffs to argue the centrality of sites to religion. This in turn would bring into play the balancing test of the second tier of the court's analysis. Given the centrality requirement of the first tier and the balancing test of the second, it is clear that if other courts follow the Sixth Circuit,

22. *Sequoyah*, 620 F.2d at 1164.
23. 374 U.S. 398 (1963).
24. 406 U.S. 205 (1972).
25. *Sequoyah*, 620 F.2d at 1163.
26. Wisconsin v. Yoder, 406 U.S. 205 (1972).
27. *Sequoyah*, 620 F.2d at 1165.
28. *Id.* at 1164, *citing* Wisconsin v. Yoder, 406 U.S. 205 (1972).
29. *Id.*, *citing* Frank v. State, 604 P.2d 1068 (Alaska 1979).
30. *Id.*, *citing* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
31. *Id.* at 1164-65.
32. *Id.* at 1165.

Native American plaintiffs face a difficult task in vindicating their free exercise rights connected with religious sites on other than their own property. Three recent decisions on substantially similar facts indicate this is likely to be the result.

In *Badoni v. Higginson*,[33] Navajo Indians claimed that Lake Powell encroached upon their religious site within the Rainbow Bridge National Monument in Utah. The district court granted summary judgment for the government on two grounds—lack of a property interest in plaintiffs, and that the government's interests outweighed the interests of the plaintiff Indians.[34]

The Tenth Circuit rejected the district court's conclusion that plaintiffs' lack of property rights was determinative of the first amendment issue.[35] The court utilized the same approach as *Sequoyah* and followed the two-step process of (1) determining whether the governmental action creates a burden on the exercise of plaintiffs' religion, and (2) if a burden is found, whether the government's interest is sufficient to override the plaintiffs' interest under the first amendment. The court concluded that the government's interest was compelling; thus it did not need to address the first step of finding a burden.[36] The approach of the Tenth Circuit indicates that the two-step hurdle is not sequential, i.e., a court need not first determine if plaintiffs have a qualifiable religious claim under the *Yoder* test before balancing the respective interests of government and plaintiff.

The Navajo plaintiffs also had asked for the issuance of regulations to control tourists so that plaintiffs could conduct their religious ceremonies at Rainbow Bridge. The court in dictum rejected this on the ground that such regulations would be "a clear violation of the Establishment Clause."[37] Thus the *Badoni* plaintiffs not only were told that their first amendment free exercise claims were insubstantial relative to the government's interest but that the establishment clause actively prevented the government from supporting the practice of their religion.

A similar conclusion was reached in *Crow v. Gullet*.[38] In *Crow*

33. 455 F. Supp. 641 (D. Utah 1977). The plaintiffs alleged that the lake waters had drowned some of the Navajo gods and that the influx of tourists desecrated the prayer spot.

34. *Id.* at 644-45.

35. Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980), *cert. denied sub nom.* Badoni v. Broadbent, 452 U.S. 954 (1981).

36. *Id.* at 177.

37. *Id.* at 179.

38. 541 F. Supp. 785 (D.S.D. 1982).

a class action was brought on behalf of individuals who practice the Lakota and Tsistsistas religions. The plaintiffs sought to have certain construction projects halted or removed from Bear Butte State Park in the Black Hills on the grounds that these projects interfered with the free exercise of their religion and to regulate activities of the general public at the park so that plaintiffs could conduct various religious practices free from interference.[39] The court found that plaintiffs had not established a sufficient burden on their free exercise rights to have a cognizable claim under the first amendment.[40] The court strongly hinted that any regulation of visitors in favor of Indian religious practices would violate the establishment clause and indicated that park accommodations already extant for the exclusive use of Indians in the practice of their religions may already be violative of the establishment clause.[41]

In *Hopi Indian Tribe v. Block*,[42] the Hopi Tribe sought to enjoin the development of a recreational facility in the Coconino National Forest. One of their claims was that their free exercise of religion required that the mountains remain free of man-made disturbances. Again it was held by the court that free exercise claims do not extend so far as to determine the uses to which the government may put its property because plaintiffs had not shown a sufficient burden on their free exercise rights and because of the establishment clause.[43]

These cases indicate that free exercise rights alone are not likely to be sufficient grounds for restricting government actions on government lands. However, the Supreme Court has apparently added another element for courts to consider in free exercise cases. In *Thomas v. Review Board of the Indiana Employment Security Division*,[44] the Court held that even if the state's interest is greater, the regulation or restriction may nevertheless be invalid if the state's interest can be achieved by less restrictive alternative means. Whether this consideration would have altered the above decisions is moot, but it is an issue that can now be raised in appropriate circumstances.

39. *Id.* at 787-88.
40. *Id.* at 794.
41. *Id.*
42. No. 81-0481, 8 I.L.R. 3073 (D.D.C. June 15, 1981), *aff'd* No. 81-1912 (D.C. Cir. May 20, 1983).
43. *Id.* at 3075.
44. 450 U.S. 707 (1981).

The Fifth and Fourteenth Amendments

The equal protection clause of the fourteenth amendment has been a powerful force for the vindication of unequal treatment of racial and minority groups.[45] The fourteenth amendment refers specifically to the states and not to the federal government. It has been consistently held, however, that the same guarantee of equal protection applies to the federal government by way of the due process clause of the fifth amendment.[46]

The doctrines the Supreme Court has promulgated to enforce the equal protection clause have undergone substantial evolution in the modern era.[47] The Warren Court produced a relatively rigid two-tier approach: (1) strict scrutiny of legislation if there exist suspect classifications or an impact on "fundamental rights," and (2) limited scrutiny (deference) for other legislation.[48] The standard set by the Court to meet strict scrutiny was a compelling state interest, thus applying to the ends of legislation as well as the means.[49] The Burger Court has kept the framework of the two-tier approach but has moved from its rigidity to strike down legislation on less exacting bases.[50]

Presumably, Native Americans challenging governmental actions resulting in the excavation of religious and burial sites could rely on the equal protection guarantee. The basic argument would be that the remains and artifacts of Native Americans are unfairly discriminated against to the detriment of the fundamental rights of living Native Americans. As a factual matter, only the burial and religious sites of Native Americans are regularly subjected to

45. U.S. CONST. amend. XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Some important cases to have addressed this language are Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954).

46. U.S. CONST. amend. V: "[N]or shall any person ... be deprived of life, liberty, or property, without due process of law; ..." Two cases to cite this principle are Buckley v. Valeo, 424 U.S. 1 (1976) and Bolling v. Sharp, 347 U.S. 497 (1954). For a general discussion, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 992 (1978).

47. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

48. See discussion in articles at note 47.

49. *Id.*

50. *See* Marshall's dissent in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissent), where he outlines what he argues is a sliding scale of scrutiny in equal protection decisions.

archaeological excavation and study in the United States.[51] Therefore, because race is a suspect classification, the differential treatment of Native American remains by governmental authorities can only be justified by a compelling governmental interest. In practice this is an almost impossible burden for government to bear.

The chief difficulty with this argument is the question of standing. The general rule is that protection of cemeteries can be invoked only through rights existing in living persons.[52] Generally this has been held to mean rights in the next of kin.[53] But when some of the heirs are unknown or are too numerous to determine, a representative suit may be maintained.[54] When dealing with archaeological sites of any substantial antiquity, it clearly is a very difficult matter to determine direct familial relationships.

Absent standing in living persons to invoke their own rights under the equal protection clause, the question becomes does the clause afford any protection to the remains of persons the great majority of whom died before the sovereignty of the United States existed? The question has apparently never been addressed by a court, but the thrust of Anglo-American jurisprudence is that only the living have protectible rights.[55]

The Indian plaintiffs in *Sequoyah* apparently sought to bring the equal protection claim as central to their case.[56] For reasons that are not apparent in either the district court's or the Sixth Circuit's opinions, the equal protection claim was not addressed by either court.

The TVA caused to be excavated more than one thousand Indian graves, the remains of which were stored in boxes for scientific study.[57] The remains of persons of other races were reburied

51. There is no quotable source for this assertion. The experience of the author is that this is the case. A check of laboratory and museum accessioning would presumably support the contention. Of course, the statement only applies to materials actually excavated in the United States, not to materials brought here from elsewhere for study.

52. *See* Anderson v. Acheson, 132 Iowa 744, 110 N.W. 335 (1907); Meagher v. Driscoll, 99 Mass. 281 (1868); Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891); St. George Indep. Serbian Orthodox Church, 326 Pa. 218, 191 A. 655 (1937), for representative holdings.

53. Codell Constr. Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394 (1947); Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933); Brownlee v. Pratt, 77 Ohio App. 533, 68 N.E.2d 798 (1946).

54. Codell Constr. Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394, 397 (1947).

55. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 393 (2d ed. 1977) for a general discussion of who may be parties to invoke the jurisdiction of courts.

56. Petition for Certiorari, No. 80-284, Sequoyah v. TVA, at 2.

57. *Id.* at 3.

with suitable respect to religious beliefs.[58] If it is possible to violate the equal protection clause based on the treatment of the dead of different races, this would appear to be the fact situation necessary to do so. The failure of the courts to address the equal protection issue leaves unanswered an important issue relative to the rights of Native Americans in their ancestors.

Is it possible to draw a principled distinction between Indian and non-Indian cemeteries? On a strictly objective level, it probably is not. It is clear, though, why archaeologists draw the distinction. They excavate ancient graves to acquire information about past societies that is obtainable in no other way. The physical remains and artifacts themselves are of secondary importance. The scientific value of these materials represents the only principled justification for their excavation. Nevertheless, it is difficult to state a convincing argument for the discriminatory treatment of skeletal remains in the face of sincere appeals by Native American peoples.

Since, as we have seen, under the common law only the heirs of individuals could assert their legal rights to protect the deceased's grave, there has remained some question in common law jurisdictions as to who protects cemeteries when the heirs are no longer knowable.[59] In the absence of statutory authority, the protection of cemeteries has been maintained by organizations that may generally be referred to as cemetery associations.[60] However, the protection of cemeteries and graves has been regarded as a special duty under the equitable jurisdiction of courts.[61] Nevertheless, cemeteries have been recognized as being abandoned.[62] When a cemetery has been abandoned there is apparently no common law recognition of a right in anyone to protect the graves from disturbance. Thus it would be possible to argue that there is no denial of equal protection for abandoned Indian graves because all abandoned graves are without protection.[63]

58. *Id.*

59. Codell Constr. Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394 (1947).

60. 14 AM. JUR. 2d *Cemeteries* §§ 5-7.

61. Brown v. Hill, 284 Ill. 286, 119 N.E. 977 (1918); Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829). *See also* 14 AM. JUR. 2d *Cemeteries* § 43.

62. Frost v. Columbia Clay Co., 130 S.C. 72, 124 S.E. 767 (1924).

63. The Cherokee plaintiffs of *Sequoyah* might take an ironic satisfaction in visiting the Squire Boone Caverns located near Corydon, Indiana. The proprietors of the caverns have excavated the remains of a man whom they believe to be Squire Boone, the brother of frontiersman Daniel Boone. They have placed these remains in a small wooden coffin which is on display in the caverns.

The Ninth Amendment

The ninth amendment to the United States Constitution states: "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."[64] Though this language has been infrequently utilized or interpreted by the courts, that it is in the Constitution suggests that it has some meaning beyond being a mere redundancy.[65] In *Griswold v. Connecticut*[66] two Justices joined with Justice Goldberg in a concurrence that indicated their belief that the ninth amendment could be used to protect certain fundamental rights beyond those listed expressly in the Constitution.

Despite the lack of clear precedential authority for the proposition, Native American plaintiffs should nonetheless be able to argue that the protection of ancestral graves and religious sites is a right commonly recognized by all persons and worthy of judicial cognizance under the ninth amendment. Justice Goldberg in *Griswold* suggested that courts look to the "traditions and conscience of our people"[67] to determine whether a principle is of such character as to be fundamental.

The thrust of this argument would not be that the ninth amendment grants any substantive rights but that certain inalienable rights exist because of their recognized importance and profundity to all people. Such judicially recognized rights would, of course, not be absolute but only cognizable in the process of judicial determinations. The district court in *Sequoyah*[68] simply dismissed the plaintiffs' ninth amendment claims on the ground that the amendment grants no substantive rights. While this is obviously true, it misses the point of interpreting what the ninth amendment in fact does do.

The ninth amendment could also be argued to have an added dimension in application to Native Americans. The United States Supreme Court has long held that Indian tribes retain all their inherent sovereignty that Congress has not expressly revoked.[69] This being so, the language of the ninth amendment would appear to be an added guarantee that rights under existing tribal sovereignty cannot be denied or disparaged.

64. U.S. CONST. amend. IX.
65. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
66. 381 U.S. 479, 486 (1965).
67. *Id.* at 487, *citing* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
68. *Sequoyah*, 480 F. Supp. at 611.
69. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

The Question of Standing

The language of article III, section 2 of the United States Constitution states: "The judicial power shall extend to all cases, in Law and Equity, . . ." [and] ". . .—to Controversies . . . ." The general requirement is that the party who is asserting a constitutional claim must have sustained or been threatened with substantial harm or detriment as a result of the action complained of,[70] or that the interest being asserted is within the zone of interests the constitutional provision was intended to protect.[71] The Supreme Court in *Baker v. Carr*[72] said that the gist of standing is whether the party has such a "personal stake in the outcome of the controversy" to ensure that the issues will be adequately litigated.

The modern trend has been to allow a much broader range of plaintiffs to have standing to bring otherwise justiciable controversies.[73] But the issue can still be a bar to some plaintiffs. In *United States v. Richardson*[74] the Supreme Court noted that standing has been greatly expanded, but it concluded that it should not be expanded so far as to have no meaning.[75]

As to noneconomic injuries in particular, the Court has allowed a very liberal standard. In *United States v. SCRAP*[76] the Court indicated that a plaintiff need only allege some "injury in fact" (economic or noneconomic) to itself. This standard would apparently only bar a plaintiff with abstract claims of generalized harm.[77]

In the federal court cases discussed earlier in regard to the first amendment issue (*Sequoyah*, *Badoni*, *Crow*, and *Hopi Indian Tribe*), the courts had no difficulty in finding that the Indian plaintiffs had standing to raise the issue. But, as noted previously, the question may be more difficult if an equal protection claim is raised. Traditionally, Anglo-American courts have only recognized rights to protect graves in the heirs at law.[78] To recognize standing in Indian plaintiffs in regard to graves of

70. Sierra Club v. Morton, 405 U.S. 727 (1970).

71. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970).

72. 369 U.S. 186, 204 (1962).

73. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

74. 418 U.S. 166 (1974).

75. *See also* Warth v. Seldin, 422 U.S. 490 (1975).

76. 412 U.S. 669, 686 (1973).

77. This was the general conclusion that banned the plaintiffs from standing in Sierra Club v. Morton, 405 U.S. 727 (1970).

78. Jacobus v. Congregation of Children of Israel, 107 Ga. 518, 33 S.E. 853 (1899); Mitchell v. Thorne, 134 N.Y. 536, 32 N.E. 10 (1892).

unknown kinship would represent an expansion of standing beyond the current common law rule. Of course, such expansion is not unknown.

The Commerce Clause

The commerce clause of the United States Constitution reads in its entirety that Congress shall have the power "to regulate Commerce with foreign Nations, among the several States and with the Indian Tribes."[79] When this power is coupled with the trusteeship power of Congress over Indian tribes,[80] it is evident that the federal government largely supersedes the states in the supervision of Indian tribes. This circumstance will be addressed more thoroughly under the heading of "Inherent Tribal Sovereignty," *infra*. Suffice it to say, at this heading, that the federal government has largely reserved unto itself the role of law giver to the Indian tribes.

It is not clear what role the commerce clause could play in the determination of Indian rights vis-a-vis archaeological interests, but presumably federal statutes justifiable under the commerce power could regulate, if only indirectly, archaeological activities.

II. *Rights Under Federal Statutes*

The American Indian Religious Freedom Act

The American Indian Religious Freedom Act[81] was passed in 1978. It provides as follows:

> [H]enceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[82]

Any statute dealing with religious matters must tread cautiously around the establishment clause. Therefore, it may be asked to what extent this language is precatory; the answer can

79. U.S. CONST. art. I, § 8, cl. 3.
80. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
81. 42 U.S.C. § 1996 (Supp. IV 1980).
82. *Id.* at § 1.

only come with experience. It has been suggested that the "law clarifies the Indian's first amendment right to freedom of religion."[83] Presumably, it does so by mandating that federal officials respect the existing rights of American Indians. It would seem impermissible that the Act enhance the rights of Indians to practice their religions.

May Indians rely on the Act to recover "sacred objects"? It has been suggested that it would be useful in reclamation attempts.[84] Presumably, the reclamation could not be enforced under the Act. If it were, it would seem to violate the establishment clause. The only way in which this could be avoided is if the Indians were already entitled to the sacred objects and they were being wrongfully withheld from them. In this case the Act merely conforms to Indian rights already existing under the free exercise clause of the first amendment. The only other possibility is if the government or other party surrenders the objects voluntarily. The holdings of *Hopi Indian Tribe v. Block*[85] and *Crow v. Gullet*[86] comport with the above analysis. Both courts held that the Act only ensures that Indians receive their rights that already exist under the first amendment. In *Hopi Indian Tribe* the court stated:

> The Act was meant to insure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees . . . . The Act does not require that access to all publicly owned properties be provided to the Indians without consideration for other uses or activities, nor does it require that Native traditional religious considerations always prevail to the exclusion of all else.[87]

This analysis leads to the conclusion that the Act is clearly not a talisman for Native Americans wishing to assert religious claims to preferential recovery of sacred objects or unrestricted use of religious sites. The Act extends only as far as the first amendment.

83. Note, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 144-45 (1979).

84. *Id.* at 145.

85. No. 81-0481, 8 I.L.R. 3073, 3076 (D.D.C. June 15, 1981), *aff'd* No. 81-1912 (D.C. Cir. May 20, 1983).

86. 541 F. Supp. at 793-94.

87. *Hopi Indian Tribe*, 8 I.L.R. at 3076.

The Archaeological Resources Protection Act of 1979

The Archaeological Resources Protection Act of 1979[88] is aimed at preserving and protecting the archaeological resources found on federal and Indian lands.[89] Before passage of this Act, federal authorities had to rely on the Antiquities Act of 1906.[90] This law imposed criminal sanctions on anyone misappropriating an "object of antiquity" from federal land. However, the Antiquities Act suffered from serious shortcomings. It failed to define adequately what an "object of antiquity" is, and the criminal penalties were relatively light. In *United States v. Diaz*[91] the Ninth Circuit held that the Antiquities Act was unconstitutionally vague.

The Archaeological Resources Protection Act of 1979 significantly improves the operation of the Antiquities Act. It displaces the term "object of antiquity" with the term "archaeological resources" and adequately defines it.[92] This should overcome the vagueness problem. Further, the new Act has much more bite in the enforcement provisions.[93]

The 1979 Act carefully provides for the differing concerns inherent in Indian and federal lands. The Act does not prohibit archaeological activities, but it does require that permits be obtained before archaeological investigations proceed.[94] The is-

88. 16 U.S.C. §§ 470aa-47011 (Supp. V 1981).

89. *See* 16 U.S.C. § 470aa(b) (Supp. V 1981). *See also* Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 HARV. ENVTL. L. REV. 61 (1982) for an especially thorough discussion of the reasons for the Act.

90. 16 U.S.C. §§ 431-433 (Supp. V 1981).

91. 499 F.2d 113 (9th Cir. 1974).

92. 16 U.S.C. § 470bb(1) (Supp. V 1981):

> The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

93. 16 U.S.C. §§ 470ee & ff (Supp. V 1981). Possible penalties now range from $10,000 to $100,000 and from one to five years incarceration.

94. 16 U.S.C. § 470cc (Supp. V 1981). An exception to the permit is allowed on Indian lands if tribal regulations are preexisting, but this applies only to a tribe or a tribal member. 16 U.S.C. § 470cc(g)(1).

suance of permits on Indian lands is subject to the consent of the Indian or the tribe, and is further subject to the terms and conditions the Indian or the tribe may impose.[95] The Act also calls for the consent of the Indian or the tribe in regard to the exchange or ultimate disposition of archaeological resources removed from Indian lands.[96]

In sum, the Act provides meaningful protection of the archaeological resources on federal and Indian lands from the depredations of those who maliciously or for profit raid archaeological sites. It allows responsible archaeological investigations on public lands, while leaving the decision as to Indian lands with the Indians.

It should be noted that the 1979 Act is an integral part of the National Historic Preservation Act.[97] The National Historic Preservation Act provides for the recognition of significant historic places by means of the National Register of Historic Places.[98] The placement of a property on the Register allows it to be qualified for favorable treatment under various statutory schemes.[99] Indian tribes are specifically provided for in section 470a(d)(B) so that they may obtain grants for the purpose of preserving historic tribal sites.

Chapter 3—Agreements with Indians

Title 25 U.S.C. Chapter 3.—Agreements with Indians[100] is concerned with the nature of the relationship that exists between the United States government and Indian tribes. Sections 81 to 88 deal with contracts that exist between the two. Sections 71 and 72 concern treaties between them.

By congressional act, dated March 3, 1871,[101] the United States statutorily refused to recognize any Indian tribe as an independent nation. As a consequence of this, Congress mandated that no further treaties would be made with any Indian tribe but that past treaties would be otherwise honored. By the Act of July 5,

95. 16 U.S.C. § 470cc(g)(2) (Supp. V 1981).

96. *Id.* § 470dd.

97. 16 U.S.C. §§ 470-470w-6 (1976 & Supp. V 1981).

98. 16 U.S.C. § 470a (Supp. V 1981).

99. *Id.* § 470a(d) provides for grant-in-aid programs to states for historic preservation projects. I.R.C. § 191(d) allows for favorable tax treatment of National Register properties.

100. 25 U.S.C. §§ 71-72 & 81-88 (1976).

101. *Id.* § 71.

1862,[102] the president was authorized to abrogate treaties with any Indian tribe when actual hostility existed between the United States and the Indian tribe.

The primary significance of these statutes is that in order to determine the substantive rights of Indian tribes with treaties with the United States prior to March 3, 1871, it is necessary to determine what rights were retained under these treaties.[103] Presumably, if such a tribe retained certain rights to practice religious ceremonies at a particular site, those rights still exist.

The American Indian Bill of Rights

The American Indian Civil Rights Act[104] has generally been referred to as the American Indian Bill of Rights. It was enacted to shore up a breach in the civil liberties of Indians.[105] Prior to the Act, under the doctrine of tribal sovereignty, Indian tribes had been held to be exempt from many of the constitutional requirements of the Bill of Rights.[106] The Act essentially extends to tribal Indians the constitutional protections of the Bill of Rights.[107]

This should mean that tribal governments must afford their members the same rights of free exercise of religion, equal protection, and due process as enjoyed by other American citizens.[108] Thus the earlier discussion in this article of these constitutional rights presumably would apply to tribal governments in their relationships with tribal members.

III. *Rights Retained: Inherent Tribal Sovereignty*

The Uncertain Status of Sovereigns Who Have Trustees

Originally, Indian tribes were autonomous groups of people living within clearly distinct cultural and social categories. Con-

102. *Id.* § 72.

103. United States v. Berry, 4 F. 779 (D. Colo. 1880).

104. 25 U.S.C. § 1302 (1976).

105. *See* Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968); Sanders, *The Bill of Rights and Indian Status*, 7 U. BRIT. COLUM. L. REV. 81 (1972); Note, *The American Indian—Tribal Sovereignty in Civil Rights*, 51 IOWA L. REV. 654 (1966).

106. Note, *Constitutional Rights of the American Tribal Indian*, 51 VA. L. REV. 121, 129-35 (1965).

107. Reiblich, *supra* note 105.

108. Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation, 507 F.2d 1079 (8th Cir. 1975).

sequently, tribal members were subject to the laws of the existing tribal government.[109] It is assumed that the laws of most tribal governments included sanctions applicable to tribal members who desecrated ancestral graves or improperly disturbed religious objects or sites.[110] This exercise of unrestricted tribal sovereignty continued until displaced or subordinated by the federal government of the United States.

In *Cherokee Nation v. Georgia*,[111] the United States Supreme Court held that Indian tribes did not exercise the sovereignty of foreign nations but rather occupied a position of dependence on the federal government resembling "that of a ward to his guardian."[112] Chief Justice Marshall referred to the tribes as "domestic dependent nations."[113]

In *Worcester v. Georgia*,[114] the Supreme Court held conclusively that the Indian tribes, while subject to federal sovereignty, were nonetheless independent of state sovereignty. Chief Justice Marshall concluded that both the historic independence of Indian tribes and the United States Constitution required this result.[115] Thus only the federal government may govern the Indian tribes.

In 1883 the Supreme Court, in *Ex parte Crow Dog*,[116] went so far as to hold that an Indian tribe had exclusive jurisdiction over crimes between Indians. In response to this, Congress promptly enacted the Seven Major Offenses Act of 1885,[117] which extended federal jurisdiction over Indians. The constitutionality of this was upheld in *United States v. Kagama*,[118] where the Court held that Indians were in a "domestic trust relationship" with the federal government.

The continuing validity of the *Worcester* doctrine of inherent

109. See M. GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY (1965); S. ROBERTS, ORDER AND DISPUTE (1979); Redfield, *Primitive Law*, 33 U. CIN. L. REV. 1 (1964), for good introductory discussions of legal anthropology.

110. There exist numerous ethnographic accounts of such acts being punished. For some examples, see the sources cited in note 109, *supra*. *See also* LAW AND WARFARE (P. Bohannan ed. 1967); GODS AND RITUALS (J. Middleton ed. 1967); K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941). An interesting discussion of the aboriginal tribal law of the Cherokee is found in Strickland, *American Indian Law and the Spirit World*, 1 AM. INDIAN L. REV. 33 (1973).

111. 30 U.S. (5 Pet.) 1 (1831).

112. *Id.* at 16.

113. *Id.*

114. 31 U.S. (6 Pet.) 515, 560-61 (1832).

115. *Id.* at 558.

116. 109 U.S. 556 (1883).

117. 23 Stat. 385 (1885).

118. 118 U.S. 375 (1886).

tribal sovereignty was indicated in *Williams v. Lee.*[119] The Court held that some state regulation of Indian affairs was permissible, but only to the extent that it does not unreasonably limit the exercise of tribal sovereignty.

In *McClanahan v. Arizona Tax Commission,*[120] the court noted the trend away from "inherent Indian sovereignty" as a basis for judicial decision, with an increased reliance on federal preemption and administrative delegation. Nonetheless, the Court was consistent with the *Worcester* doctrine in concluding that tribal Indians retain all that inherent sovereignty that Congress has not superseded.[121]

Oliphant v. Suquamish Indian Tribe[122] recognized that Indian tribes retain quasi-sovereignty, but that these retained powers are limited by treaties or congressional enactments and must also be limited to those powers not inconsistent with their status as nonautonomous states. This holding seems to diminish further the extent of inherent tribal sovereignty. Now tribal sovereignty may be wielded to the extent that it does not violate treaties, federal statutes, and principles of nonautonomy.

The extent of tribal sovereignty nevertheless remains broad in regard to activities on tribal lands. In *White Mountain Apache Tribe v. Bracker,*[123] the Court found that an Indian tribe retains attributes of sovereignty over tribal members and tribal lands. And in *Montana v. United States,*[124] the Court held that a tribe may exercise civil jurisdiction over non-Indians on tribal lands by way of reasonable regulations.

It appears that so long as Congress does not preempt the tribes' authority, a tribe may absolutely bar archaeological activities on tribal lands or regulate such activities in a reasonable manner. A likely situation where this exercise of tribal authority could clash with other interests is in projects on tribal lands that would require an environmental impact statement.[125] Would Indians be able to prevent an archaeological investigation required by the National Environmental Policy Act of 1969?[126] Would such exercise of tribal sovereignty violate the *Oliphant* concept of

119. 358 U.S. 217 (1959).
120. 411 U.S. 164, 172 (1973).
121. *Id.* at 171-72.
122. 435 U.S. 191, 208 (1978).
123. 448 U.S. 136 (1980).
124. 450 U.S. 544 (1981).
125. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C)(i) (1976).
126. *Id.* §§ 4321-4361.

nonautonomy, or must Congress act to limit such exercise? A similar uncertainty could arise under the environmental mitigation procedures of the Surface Mining Control and Reclamation Act.[127] Each state is allowed to submit surface regulations to the Secretary of the Interior for approval. Such approved regulations are state law. Could a tribe avoid compliance with state requirements for the mitigation of archaeological sites on tribal lands on the basis of tribal sovereignty?

IV. *Rights Under State Statutes*

It has previously been emphasized that states are greatly limited in any exercise of state authority over Indian tribes and tribal lands. This section discusses existing state statutes applicable to archaeological sites on non-Indian lands. There are three kinds of state statutes that could apply to historic and prehistoric Indian burials.[128]

First are the state historic preservation statutes. These vary widely in character but have as their essential purpose the preservation of significant cultural and natural resources within a state. The determination of the significance of a particular archaeological site is made by a state official, usually titled the state archaeologist or the state historic preservation officer. The Iowa statute, for example, states: "The state archaeologist shall have the primary responsibility for the discovery, location and excavation of archaeological sites and for the recovery, restoration and preservation of archaeological remains in and for the state of Iowa . . . ."[129] If a site is regarded as being of major importance, it may be preserved in its entirety.[130] More commonly the ma-

127. 30 U.S.C. §§ 1201-1328 (Supp. V 1981). It may be noted that any activities leading to archaeological studies under SMCRA would probably destroy the sites eventually. Thus such a case as hypothesized here would be somewhat pointless. Moreover, such a confrontation is probably avoidable because section 1300 of SMCRA authorizes consultations with Indian tribes on the regulations.

128. It is beyond the scope of this article to review systematically these statutes. Anyone wishing to learn more of the statutes of a particular state should check the subject index of that state's statutes. Some key terms that may help locate the sought-for statutes are: preservation, historic, Indians, archaeological, cemeteries, graves, and reburial.

129. IOWA CODE § 305A.2 (1975).

130. Some prominent examples are the Cahokia Mounds site in Illinois, Mesa Verde in Colorado, and the Hopewell Mounds in Ohio. Such total preservation of a site is usually a result of the site being designated a state park and being administered by state park personnel.

terials encountered in an archaeological investigation are studied, packed away, and curated in some state facility.

The second kind of statute of possible significance to the preservation of Indian remains is the general state statute dealing with cemeteries and graves. Every state has statutes regulating the use of land for cemeteries and graves. Many of these statutes are so general in character as to be applicable to any cemetery or grave. Indiana, for example, defines cemetery to mean "any land or structure in this state dedicated to and used, or intended to be used, for the interment of human remains."[131] Such a broad definition could easily include ancient Indian cemeteries. Only judicial interpretation or legislative clarification can determine what is actually meant by such language. Certainly, the sites of ancient cemeteries were not contemplated when such statutes were enacted, but that need not bar their possible inclusion within the scope of such acts. Creative legal arguments based on state burial statutes could be made in an effort to protect Indian burial grounds. The denial of inclusion of ancient burials within the protection of general state burial statutes could be a denial of equal protection under either the fourteenth amendment of the United States Constitution or similar provisions of state constitutions. As previously indicated, this question is unresolved as to the federal government[132] and has apparently never been addressed by a state court.

The third kind of state statute of concern here includes those dealing expressly with Indian burials. They are invariably of recent origin and are of particular significance to both Indians and archaeologists because they contain provisions for reburial in accordance with modern Indian religious beliefs.[133] These statutes are particularly controversial to scientific archaeologists because under their provisions archaeologists must surrender human

131. IND. CODE ANN. §§ 23-14-1-1 (a) (Burns 1982).

132. Petition for Certiorari, No. 80-284, *Sequoyah v. TVA*.

133. The author is aware of four states with statutes authorizing the reburial of Indian remains in appropriate circumstances: CAL. PUB. RES. CODE §§ 5097.9-5097.99 (pkt. pt.) (West 1983); IOWA CODE § 305A.7 (pkt. pt.) (1975); ME. REV. STAT. ANN. tit. 22, § 4720 (1964); MINN. STAT. ANN. § 307.08 (pkt. pt.) (West 1983). In 1981, North Carolina was considering enactment of similar legislation. The state of Washington since 1941 has had an Indian Graves and Records Act, WASH. REV. CODE § 27.44.010-020 (1951). This Washington statute makes willful disturbance of Indian graves a gross misdemeanor but allows excavation for scientific purposes by archaeologists. South Dakota archaeologists in 1976 adopted the policy of the Iowa Code provision for reburial of Indian remains. *See The Question of Reburial: Archeologists Debate the Handling of Prehistoric Human Skeletal Remains*, EARLY MAN MAGAZINE 25 (Autumn 1981).

skeletal remains to certain Indian representatives for reburial.[134] These remains have traditionally been curated for purposes of future scientific study when new scientific procedures are developed. The archaeologists argue that reburial results in a loss of future scientific data, and this is unacceptable to them.[135] Indians, on the other hand, could argue that such statutes are compromises, because the statutes respect the interests of both Indians and archaeologists. This is so because archaeological study is expressly allowed for a reasonable period of time and Indian religious concerns are acknowledged by the required reburial. The incompatible world views of Indians and archaeologists are unlikely to allow an easy resolution of the disagreements over these statutes. They are a significant departure from past state policies and will certainly continue to raise controversial issues of the religious rights of Indians and the legal limits of scientific inquiry.

V. *The Rights of Archaeologists*

The primary emphasis of this paper has necessarily been the rights of Indians in regard to ancient Indian remains. But archaeologists also may have some rights relative to these same remains. Such materials have been the traditional subject matter of archaeological investigations. Could such laws as the reburial statutes discussed *supra* impermissibly abridge rights archaeologists have under the United States Constitution?

The due process clauses of the fifth and fourteenth amendments both contain the word "liberty." Included in the concept of "liberty" is the right to pursue a lawful occupation.[136] Related to this right is the right to engage in a chosen profession free from unreasonable governmental interference.[137] Of course, statutes like the reburial ones do not positively bar archaeological activities, but they do clearly abridge them. The contest here would be between the state's police power and the right of an archaeologist to be free from unreasonable restraints on the practice of his profession. Is such a restraint as the reburial requirement unreasonable?

Another aspect of this question is the issue of property rights.

134. EARLY MAN MAGAZINE, *supra* note 133, at 25.

135. *Id.*

136. Board of Regents v. Roth, 408 U.S. 564 (1972).

137. United States v. Robel, 389 U.S. 258 (1967); Greene v. McElroy, 360 U.S. 474 (1959). It may be noted that *Robel* was primarily based on first amendment grounds.

When ancient remains are buried in the ground, they presumably belong to the landowner, either as an aspect of the fee or as a kind of undiscovered personalty. When reduced to possession, they presumably belong to the possessor absent some law or agreement to the contrary. Thus, human remains or religious objects in the possession of a professional archaeologist are either the personalty of that archaeologist or belong to the entity for which the archaeologist works. If the entity is the state or federal government, then the archaeologist's right to possession of the materials for scientific study become very attenuated. If the materials are in fact the personalty of the archaeologist, would a statutory requirement of reburial be an impermissible taking of private property without just compensation in violation of the fifth amendment?[138] As a judicial matter, the determination of ownership between a landowner, an archaeologist, the state, or possible Indian claimants could be very complex.

Archaeologists might also look to the first amendment as a possible source of rights to protect the practice of a profession free from unreasonable government interference. In *United States v. Robel*,[139] the Court recognized that banning a person from employment was a form of civil punishment and as such must conform to the requirements of the first amendment. Of course, the statutes discussed here do not ban an archaeologist from practicing the profession, but are they reasonable limitations to such practices? Would the freedom of expression implied in the first amendment protect a professional from being unduly hampered in practicing the traditional regimen of the profession? It seems likely that such an issue would have to be resolved by balancing the interests of the state against the rights of the archaeologist in the pursuit of scientific inquiry.

It is also conceivable that state or federal laws requiring reburial in deference to the religious practices of Indians would be violative of the establishment clause of the first amendment. If so, then unconstitutionality could be a defense to archaeologists seeking to avoid the reburial requirement.

To what extent would an archaeologist be liable for violating a state or federal statute in the course of practicing scientific archaeology? Acting as an individual, an archaeologist is like any

138. This question has never been adequately resolved and perhaps it is not susceptible to a general, authoritative answer. The Ethical Canons of the Society for American Archaeology generally disavow any claim of ownership on the part of the individual archaeologist. It is probably best to judge each case *sui generis*.

139. 389 U.S. 258 (1967).

other citizen in respect to the laws. But acting as an employee of the state or federal government, other considerations arise. In such employment the archaeologist is an agent of the government and as such may be protected by the doctrine of sovereign immunity. Sovereign immunity is a common law doctrine that holds a government is immune from suit by a citizen absent the consent of the government to be sued.[140] But the protection extends only so far as the agent is acting within the scope of his authority.[141] Moreover the agent is not protected if his act was tortious.[142] If the agent's act was tortious or wrongful, then the agent may be individually liable.[143] Therefore, using the above analysis, an archaeologist is not likely to be held liable in excavating Indian burials so long as it is done within the scope of employment and is done nontortiously. It should be noted that the doctrine of sovereign immunity has come under increasing disfavor in many jurisdictions.[144]

Conclusion

This article has sought to present a comprehensive coverage of the substantive issues likely to arise in a legal confrontation between Native Americans and archaeologists concerning the scientific investigation of ancient human remains and religious objects. The conflict has emotion-laden aspects for each side. The conceptual world view of Native Americans is essentially incompatible with that of scientific archaeologists. Hence, it is unrealistic to expect solutions fully satisfactory to both sides.

The laws and the courts of the United States afford every citizen the right to seek redress of grievances. If voluntary accommodations are not reached, the courts have the wherewithal to resolve the issues judicially. Potentially, the United States Constitution, federal and state statutes, treaties, and the judicial concept of inherent tribal sovereignty offer many avenues for Native Americans to attempt to protect ancient graves and religious objects. Likewise, archaeologists have valid recourse to legal doctrines to protect their interests in the scientific study of the past. It is hoped that in any such contest each side will respect the sincerity of the other's position.

140. People v. Superior Court, 29 Cal. 2d 754, 757, 178 P.2d 1, 2 (1947).
141. Glassman v. Glassman, 309 N.Y. 436, 131 N.E.2d 721 (1956).
142. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).
143. *Id.*; Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).
144. Taylor v. New Jersey Highway Auth., 22 N.J. 454, 126 A.2d 313 (1956).